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No. 110

In the Supreme Court of the United States

OCTOBER TERM, 1935

UNITED STATES OF AMERICA, PETITIONER

v.

THE FIRST NATIONAL BANK OF BOSTON ET AL., TRUSTEES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

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The Solicitor General, on behalf of The United States of America, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the First Circuit entered in the above cause on March 9, 1935, reversing the judgment of the District Court of the United States for the District of Massachusetts.

OPINIONS BELOW

The opinion of the District Court of the United States for the District of Massachusetts (R. 17–22) is reported in 7 F. Supp. 915. The opinion of the Circuit Court of Appeals (R. 29) is reported in 76 F. (2d) 200.

JURISDICTION

The judgment of the Circuit Court of Appeals reversing the judgment of the District Court was entered March 9, 1935. (R. 33.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether personal property of a decedent, passing to the taxpayers otherwise than by specific bequest, may be considered to have been held by the taxpayers, under the provisions of Section 101 (c) (8) of the Revenue Act of 1928, during any period prior to actual distribution to the taxpayers.

STATUTE INVOLVED

The statute involved will be found in the Appendix, *infra,* pp. 8–9.

STATEMENT

This is an action by trustees (hereinafter called taxpayers), under a will, to recover additional income tax assessed against them for the year 1928. The facts were found by the District Court to be as stipulated (R. 15) and may be summarized as follows (R. 6–8):

Edward E. Blodgett of Newton, Massachusetts, died April 4, 1926 (R. 6), leaving a will (R. 9–13) by the terms of which *inter alia* he devised the residue of his estate to the taxpayers in trust.

The decedent's will was duly probated, and the widow of the decedent qualified as executrix of the will. The taxpayers filed on March 15, 1929,[1] with the Collector of Internal Revenue at Boston, Massachusetts, income-tax returns as trustees with respect to the income of the trust estate for the calendar year 1928. The amount of the tax shown to be due was duly paid to the then Collector of Internal Revenue at Boston, Massachusetts, who, in turn, paid it over to the United States. (R. 7.)

Thereafter, on March 21, 1931, within the time allowed by law, the Commissioner of Internal Revenue assessed against the taxpayers an additional income tax for the year 1928 in the amount of $4,500.26 with interest of $544.47, which amounts, in the total sum of $5,044.73, were paid April 3, 1931, to the then Collector of Internal Revenue, who duly covered them into the Treasury of the United States. (R. 7.)

After due claim for refund had been filed by the taxpayers with the Collector of Internal Revenue on July 29, 1931, and rejected by the Commissioner of Internal Revenue on January 22, 1932 (R. 8), the taxpayers instituted these proceedings in the District Court for recovery of the full amount of the additional assessment.

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[1] The stipulation (Par. 3) sets this date as 1928, but this is an obvious error.

Part of such additional assessment was based upon the following action of the Commissioner of Internal Revenue (R. 7–8):

> The transfer by the Commissioner from capital net gain to ordinary income of the sum of $74,773.08. This sum represented the profit realized by the petitioners [the taxpayers] from the sale in 1928 of certain securities belonging to the trust estate. These securities had all been the property of the decedent and a part of his estate at the time of his death, which was more than two years before the date of sale, but they had been received by the petitioners from the executors as a part of the petitioners' share as residuary legatees within two years from the date of sale. The bases used in determining the amount of the profit, both by the petitioners and by the Commissioner, was the fair market value of such property on the date it was transferred by the executors to the petitioners, in accordance with Section 113 (a) (5) of the Revenue Act of 1928.

The District Court sustained the action of the Commissioner in transferring from capital net gain to ordinary income the sum of $74,773.08, which represented the profit realized by the taxpayers from the sale in 1928 of certain securities belonging to the trust estate. Judgment on that point for the United States was accordingly entered by the District Court. (R. 16.) The only question presented to the Circuit Court of Appeals

was whether the item of $74,773.08 should be taxed as capital net gain or as ordinary income. That court reversed the District Court, holding that the taxpayers were to be considered as having held the securities in question from the date of the death of the decedent, and that such date being more than two years prior to the taxpayers' sale of the securities, the securities were in their hands "capital assets" and the gain "capital net gain."

SPECIFICATION OF ERRORS TO BE URGED

The United States urges that the Circuit Court of Appeals erred:

1. In holding that the taxpayers, as residuary legatees receiving personal property upon distribution of the decedent's estate, were to be deemed to have held such property from the date of the decedent's death for the purpose of determining the holding period, under the provisions of Section 101 (c) (8) of the Revenue Act of 1928, *infra*.

2. In failing and refusing to hold that for the purpose of determining the holding period, under the provisions of Section 101 (c) (8) of the Revenue Act of 1928, *infra*, the taxpayers, as residuary legatees, should be deemed to have held personal property received upon distribution of the decedent's estate only from the date of actual distribution to the taxpayers.

3. In reversing the judgment of the District Court and remanding the case.

REASONS FOR GRANTING THE WRIT

The court below decided that a residuary legatee, receiving personal property upon distribution of a decedent's estate, should be deemed to have held such property from the date of the decedent's death for the purpose of determining the holding period, under the provisions of Section 101 (c) (8) of the Revenue Act of 1928, *infra*.

This decision conflicts in principle with the decision of the Circuit Court of Appeals for the Third Circuit in *McFeely* v. *Commissioner*, 74 F. (2d) 1017. The taxpayer in that case applied to this Court for a writ of certiorari, and in its petition asserted a conflict between the decision in that case and the decisions of the court below in the present case and in the case of *Lee* v. *Commissioner*, 76 F. (2d) 203. While the facts in the *McFeely* case are different from the facts in the present case in that there the taxpayer is the donee of a widow who had elected under the laws of Pennsylvania to take against the will of her deceased husband and here the taxpayers are residuary legatees, yet the broad question in both is whether personal property of a decedent, passing to the taxpayer otherwise than by specific bequest, may be considered to have been held by the taxpayer, under the provisions of Section 101 (c) (8) of the Revenue Act of 1928, during any period prior to actual distribution to the taxpayer. In the *McFeely* case it was decided that the property was "held" only from the date of distribution, while

in the present case it was decided that the property was "held" from the date of decedent's death. Believing that the decisions were in conflict in principle, the Government did not oppose the granting of the writ in the *McFeely case*. This Court granted certiorari on May 20, 1935, No. 876, October Term, 1934.

The decision of the court below in the present case is also in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Ogle* v. *Helvering*, decided May 6, 1935, not officially reported but found in Vol. I, Prentice-Hall, 1935, par. 1316. In that case the court held that for the purpose of Section 101 (c) (8) of the Revenue Act of 1928, *infra*, the taxpayer, one of the next of kin of an intestate decedent, "held" personal property only from the date of distribution of the property to her and not from the date of the decedent's death. The court there expressly recognized a conflict between its decision and the decision of the court below in the present case.

The Circuit Court of Appeals for the Ninth Circuit in *Dibblee* v. *Commissioner*, 75 F. (2d) 617, has also decided the question contrary to the decision below, but that case is now pending on the taxpayer's petition for rehearing.

Wherefore, it is respectfully prayed that this petition be granted.

STANLEY REED,
Solicitor General.

JUNE 1935.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791, 811, 822:

SEC. 101. CAPITAL NET GAINS AND LOSSES.

(a) *Tax in case of capital net gain.*—In the case of any taxpayer, other than a corporation, who for any taxable year derives a capital net gain (as hereinafter defined in this section), there shall, at the election of the taxpayer, be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain.

* * * * *

(c) *Definitions.*—For the purposes of this title—

* * * * *

(8) "Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. For the purposes of this definition—

* * * * *

(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

(5) *Property transmitted at death.*—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. * * *

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